STATE OF MICHIGAN

COURT OF APPEALS

GOVERNING BOARD OF CITY OF DETROIT EMPLOYEES' BENEFIT PLAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2003
v	No. 234823 Wayne Circuit Court
CITY OF DETROIT, a Municipal Corporation, Defendant-Appellant.	LC No. 98-839606-NZ

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals by right from the trial court's grant of summary disposition to plaintiff under MCR 2.116(C)(10). We affirm.

Many of the facts in this case are undisputed. The City of Detroit Employees' Benefit Plan was created by a 1945 amendment of the city's charter in order to provide health and death benefits to city employees. Under the 1945 amendment, plaintiff was granted control, as trustee, over the benefit funds created by the amendment, but the city maintained custody of the funds.

At an unspecified time, Blue Cross and Blue Shield of Michigan (BC/BS) became the health insurer for the city. Contributions from the city, from employees, and from retirees for health benefits were deposited into a designated city account – account 604 – over which plaintiff exercised some type of oversight,[1] but not custody, under the terms of the 1945 amendment to the city charter. Money was then transferred to BC/BS from the account in order to secure health benefits for employees and retirees. Generally, the city made the actual payments from the account, but plaintiff had some type of oversight over the transactions and acted as a trustee of the account.[2]

[1] Witnesses gave various testimony about the extent of plaintiff's involvement with this account, and defendant argues that plaintiff's involvement was and is minimal. Testimony established, however, that plaintiff exercises some type of oversight with respect to it.

[2] See footnote 1, *supra*.

Before November 1992, BC/BS had a traditional arrangement with the city, in which BC/BS insured city employees and retirees and undertook the risk that premiums would not cover the incurred claims. As a cost-saving measure, the city converted in November 1992 to a self-insurance plan, with BC/BS as the administrator. The city itself now covers the risk of loss. Because of the changeover to self-insurance, BC/BS returned to the city two funds previously held by BC/BS: (1) a statutorily-required fund representing a "reserve" to cover potential shortfalls in the event the health plan was terminated,[3] referred to by the parties in this case as the "incurred but not reported reserve" fund (IBNR fund), and (2) a fund representing money obtained by BC/BS as a result of cost-recovery initiatives. In this opinion, we will refer to this second fund as the "cost-recovery initiatives" fund (CRI fund).

After the transfer of the IBNR and CRI funds from BC/BS to the city, the city maintained control over them, as well as over a third fund holding the interest from both the IBNR and the CRI funds. They declined to deposit the funds into the 604 account over which plaintiff has some amount of oversight. In its complaint, plaintiff alleged that it, as the entity designated to oversee the city's health benefit plan, was entitled to control the funds at issue. Plaintiff maintained that "[a]s long as these funds remain in the possession of the City, the City and/or City Council have the ability to divert the funds for purposes inconsistent with the trust" maintained for health benefits. Plaintiff sought (1) mandamus over defendant, requesting that the court order defendant "to perform its clear legal duty to relinquish custody of the cost recovery funds and terminal liability reserves to [plaintiff]" (Count I), and (2) a declaration that plaintiff "is entitled to and the City has a duty to relinquish the Benefit Plan trust assets currently retained on deposit in the City's general fund" (Count V).[4]

After considering motions for summary disposition from both parties, the trial court ultimately granted plaintiff the relief it desired, concluding, without much elaboration regarding its reasoning, that the 1945 amendment of the city charter granted plaintiff control, although not custody, over health benefit funds and that therefore plaintiff was entitled to control the funds at issue. The written order states:

> IT IS FURTHER ORDERED that Counts I and V of Plaintiff's Complaint for both Mandamus and Declaratory Judgment are granted in part and denied in part.[5] The funds at issue shall be under the exclusive control of the Plaintiff Board subject to Plan provisions as provided by the City Charter as amended. It is further ordered that the Treasurer for the City of Detroit is the Treasurer of the

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[3] Although it is not a dispositive point, it appears to us from the record that this fund also includes money to be used to stabilize rates in the event that drastic premium increases become necessary.

[4] Plaintiff pleaded additional legal theories in Counts II through IV of its complaint, but these counts were dismissed by the trial court, and plaintiff has not appealed their dismissal.

[5] This partial "denial" apparently refers to the trial court's conclusion that defendant was entitled to *custody* of the funds at issue.

> Plan and shall be the custodian of its funds in accordance with the Plan provisions.
>
> IT IS FURTHER ORDERED that the Treasurer for the City of Detroit is to accumulate all funds at issue in this matter which he currently holds, plus all interest actually accrued thereon, and shall deposit said funds into such account or accounts as directed by the Plaintiff and only to be accessed by the City of Detroit Treasurer at the exclusive control and direction of Plaintiff.

The court's order was stayed pending appeal, although the court ordered that "throughout the stay of this Order there are to be no disbursements, transfers or any other use of the subject funds without the written approval of both [plaintiff and defendant]."

On appeal, defendant first argues that plaintiff's complaint sought only custody – as opposed to control – of the funds at issue and that this custody belongs exclusively to defendant under the 1945 amendment of the Detroit City Charter of 1918, Title 9, Chapter 8, § 6(d), which states that "[t]he city treasurer shall be treasurer of the [benefit] plan and the custodian of its funds." Apparently, defendant is arguing that the only relief plaintiff sought is relief that is explicitly unavailable to it. We cannot agree with this argument.[6]

Plaintiff's complaint indicates that certain assets of the health benefit fund are contained in the "604 Fund" and are overseen by plaintiff. The complaint further alleges that plaintiff made a demand on defendant in May 1998 to deposit the disputed funds at issue into this "604 Fund." The complaint then states, in Count I, that "[t]he City has a clear legal duty to remove the BC/BS cost recovery funds and terminal liability reserves from the City's General Fund and relinquish and surrender such trust assets to the Trustees of the Employees Benefit Plan." The complaint additionally states in Count I that "the City has committed a clear legal error in withholding such monies from the Governing Board and retaining them on deposit in the City's general fund." It is clear from the above that the complaint sought to have the funds removed from the city's general fund and transferred *into an account over which plaintiff exercises oversight*. Indeed, the complaint mentions plaintiff's desire to have the money deposited into the "604 Fund," and according to defendant's own brief, this fund is a city account. While plaintiff may have control over this account, the city retains custody of it. Therefore, plaintiff was not seeking "custody" in the literal sense of the word but was seeking control of the funds at issue. In fact, in Count V, the complaint explicitly alleges that "[t]he City's wrongful holding of the Employees Benefit Plan trust assets, and unlawful refusal to relinquish *control* of the trust assets to the Governing Board, is a violation of law" (emphasis added). While defendant is correct that much of the complaint refers to plaintiff's seeking custody of the funds at issue, the fact remains that plaintiff also sought *control* of those funds. To the extent plaintiff did seek custody, the trial court denied this relief in its ruling, and plaintiff has not appealed the denial. Reversal based on

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[6] We note that our review of the issues in this case is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998) (this Court reviews de novo a trial court's grant of summary disposition).

defendant's use of semantics (i.e., defendant's emphasis on plaintiff's use of the word "custody") is unwarranted.

Next, defendant argues that, to the extent plaintiff seeks merely a declaratory judgment that it should control the funds at issue, it did not present an actual case and controversy to the court. As noted in *Evans Products Co v State Bd of Escheats*, 307 Mich 506, 528-529; 12 NW2d 448 (1943), a declaratory judgment action cannot be properly submitted for decision unless an actual and bona fide controversy exists. An actual controversy does not exist if the plaintiff's interest is contingent on the happening of a future event. *Id.* at 528. Defendant contends that plaintiff instituted the instant case only because it feared that defendant *might* someday misappropriate the money in the funds at issue and that therefore no justiciable controversy existed. Plaintiff contends that such a controversy did exist because it "presently has no control over the funds and has no ability to stop the City from diverting funds for use in non-healthcare related projects absent judicial interpretation." Below, the trial court ruled, in part:

> And so I said to myself what is in controversy here? Well, the []30 million dollars is in controversy; it's in existence. It's – there is something to argue about. The argument is what happens to the []30 million dollars while it is waiting to be spent . . . .
>
> So, it seems like there is a case in controversy since you all are arguing over who shall control this thing that is here. We have this pile of money here, now who gets to say does it go into the National Bank of Detroit, does it go into Michigan National Bank, does it go to the Comerica Bank, does it go to First Independence? Where does it go? And I'm sort of using those as – not literally but to indicate where, where does this money go?

We agree with the court that a justiciable controversy existed. Indeed, at the time of plaintiff's lawsuit, defendant exercised complete control over the funds at issue and made decisions with respect to them without the oversight of plaintiff. With its lawsuit, plaintiff sought to institute this oversight, *the lack of which was itself an injury* on plaintiff's part. We simply cannot analogize the instant case to one such as *Recall Blanchard Committee v Secretary of State*, 146 Mich App 117, 123; NW2d (1985), in which the potential injury was dependent on a future event. As noted in *Recall Blanchard*, *id.* at 121, "The declaratory judgment rule is intended to be liberally construed to provide a broad, flexible remedy to increase access to the courts . . . ." Keeping this principle in mind, it is clear that the trial court did not err in its ruling on this issue.

Next, defendant argues that the trial court "had no subject matter jurisdiction to grant the relief sought in counts I and V of plaintiff's complaint as these claims are [claims of] unfair labor practices over which the Michigan Employment Relations Commission [MERC] has exclusive jurisdiction." We conclude that defendant has not established a basis for appellate relief with respect to this issue. First, the portions of plaintiff's complaint cited by defendant in its briefing

of the issue are largely either (1) general allegations not directly applicable to plaintiff's claims[7] or (2) allegations concerning a breach of contract claim dismissed by the trial court and not at issue on appeal. Moreover, to the extent defendant is arguing that the claims raised in Counts I and V of the complaint were subject to the exclusive jurisdiction of the MERC, plaintiff fails to set forth any authorities or arguments indicating that disputes raised by a board of trustees such as plaintiff are subject to the exclusive jurisdiction of the MERC.[8] Therefore, plaintiff has waived the issue for purposes of appeal. See, e.g., *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001); see also *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998).

Next, defendant argues that the city charter and its amendment do not authorize the ruling made by the trial court. The 1945 amendment of the city charter states, in relevant part:

> The City of Detroit Employees Benefit Plan (hereinafter referred to as the plan) is hereby established for the purpose of providing hospital and surgical benefits to the employees of the City of Detroit and death benefits under the provisions of this Charter amendment. [1945 amendment of the Detroit City Charter of 1918, Title 9, Chapter 8, § 1.]
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> There is hereby created a governing board in whom is vested the general administration, management and responsibility for the proper operation of the plan and for making effective the provisions of this amendment. The board shall be organized immediately after the effective date of this amendment. [*Id.* at § 3.]
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> * * *
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> The city treasurer shall be treasurer of the plan and the custodian of its funds. All payments from the funds of the plan shall be made by the city treasurer only upon regular city vouchers. No voucher shall be drawn unless it shall have been previously authorized by resolution adopted by the board. [*Id.* at § 6(d).]
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> * * *
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> The board shall be the trustees of the several funds created by this amendment and shall have full power to invest and reinvest such funds subject to all terms, conditions, limitations and restrictions imposed by the laws of the State of Michigan upon life insurance companies in the making and disposing of their

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[7] For example, defendant cites paragraph 31 of the complaint, which involves the city's transition to a self-insurance plan in 1992, but plaintiff did not seek to declare the transition to a self-insurance plan invalid.

[8] Defendant argued below that plaintiff "is not a party to any contract or collective bargaining agreement with the city or any union."

> investments, except that notes, bonds or obligations of the City of Detroit shall not be subject to said restrictions or limitations. The board shall have the power to purchase notes, bonds or obligations of the City of Detroit at any legally conducted public or private sale. The board shall have full power to hold, purchase, assign, transfer and dispose of any of the securities and investments in which any of the funds created herein shall have been invested as well as the proceeds of said investments and any moneys belongs to the said funds.
>
> []All funds of the plan shall be held for the sole purpose of meeting disbursements for benefits and other payments authorized by the provisions of this amendment and shall be used for no other purpose. The description of the various funds of the plan shall be interpreted to refer to the accounting records of the plan and not to the actual segregation of moneys in the funds of the plan. [*Id.* at § 14.]

Defendant emphasizes that § 14 of the amendment identifies plaintiff as "trustees of the several funds created by this amendment" and argues that the funds at issue were *not* created by the amendment. Defendant states, "[i]n 1945, when this language was adopted, this Fund, a reserve fund necessary to implement self-insurance coverage, did not exist."[9] Defendant states that "[t]he drafters of the amendment could have used language that Plaintiff be trustee of the 'Plan's funds' if they intended that Plaintiff . . . be trustee over all plan funds" and that "[t]he trust res consists only of funds created by the 1945 amendment and does not include the reserve fund in issue." Once again, we cannot accept defendant's argument. Indeed, reading the charter document for the City of Detroit Employees' Benefit Plan as a whole, it is abundantly clear that the phrase "several funds created by this amendment" in § 14 refers to the funds necessary "for the purpose of providing hospital and surgical benefits to the employees of the City of Detroit and death benefits under the provisions of this Charter amendment." See 1945 amendment of the Detroit City Charter of 1918, Title 9, Chapter 8, § 1. Indeed, to read the phrase as defendant suggests makes no logical sense. Defendant argued below that "[t]he only fund actually created by the Plan is an administrative expense fund described in Chapter 8 § 14 [sic, 16] of the Charter." Section 16 states:

> The Expense Fund shall be the fund to which shall be credited all moneys provided by the city, and its eligible subdivisions to pay the administration expense of the plan, and from which shall be paid all expenses necessary in connection with the administration of the plan. The board shall annually certify to the council the amount of appropriation necessary to administer the plan during the ensuing fiscal year.

It would make no sense for plaintiff, vested by § 3 of the charter with the "management and responsibility for the proper operation of the plan," to be a trustee of and have investment power over only the administrative expense fund described in § 16. Moreover, it would make no sense

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[9] Defendant mentions only the IBNR fund, and not the CRI fund, in this part of its argument.

for the charter to refer to "several funds" in § 14 if the only fund over which plaintiff had power was the administrative expense fund. The only logical manner in which to read the benefit plan charter is to conclude that plaintiff is a trustee over the funds necessary for the provision of health and death benefits to city employees. We thus view the benefit plan charter as unambiguous and not subject to judicial interpretation. See *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652, 658-659; 651 NW2d 458 (2002) (discussing the interpretation of contracts and statutes). Moreover, even if the benefit plan charter *were* ambiguous, we would construe it in the logical manner discussed above. Accordingly, the trial court correctly concluded that the funds at issue in this case, which relate to the provision of health benefits to city employees, are subject to the control of plaintiff under the terms of the 1945 amendment to the city charter.[10] Both mandamus and declaratory relief were appropriate.

Next, defendant argues that the trial court erred by granting summary disposition to plaintiff because the "past practices" of the parties established that defendant was entitled to control the funds at issue. Defendant states that plaintiff has not been involved with the funds at issue and that "the City administered the health care benefits for its employees and maintained and invested all reserve funds since the date it became self-insured." Defendant argues that "[t]his past practice requires that the City continue to maintain these funds in the manner that it has in the past, regardless of charter provisions."

Defendant relies in part on *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority,* 437 Mich 441, 454-455; 473 NW2d 249 (1991), in which the Court stated:

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment." [Footnotes omitted.]

See also *Detroit Police Officers Assn v Detroit*, 452 Mich 339, 346-349 (1996) (discussing the "past practice" doctrine in the context of a city charter provision). Defendant sets forth numerous examples and deposition excerpts demonstrating that it, and not plaintiff, has been managing the health benefit program, doing things such as collecting premiums, disbursing payments, and developing rates. Defendant argues that the trial court thus erred by granting control of the funds to plaintiff. We cannot agree that this issue merits appellate relief. First, the

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[10] Defendant cites the "custody" language from § 6(d) of the benefit fund charter and also cites a 1997 document in which the city treasurer is directed to "[h]ave custody of all moneys . . . of the city . . . ." Defendant argues that these provisions mandate a reversal of the trial court's ruling. We do not agree. As noted earlier, that the city has *custody* of the funds is not disputed, but despite the city's custody, plaintiff has oversight of the funds under the terms of the benefit fund charter.

cases defendant cites involve unions, and defendant fails to set forth an argument indicating why the "past practice" doctrine would apply to this lawsuit between the city and plaintiff, a board of trustees.[11] See, e.g., *Silver Creek Twp, supra* at 99, and *Palo Group Foster Care, supra* at 152 (discussing deficient briefing). Moreover, plaintiff does not dispute that it is not involved in the day-to-day operation of the health program. Instead, plaintiff desires *oversight* of the funds at issue. By setting forth the city's day-to-day management of the funds and plaintiff's acquiescence in this practice, defendant has not sufficiently demonstrated that plaintiff acquiesced in giving defendant general oversight of the funds. Reversal is unwarranted.

Finally, defendant argues that the court, by way of its ruling, "changed terms and conditions of employment that were mandatory subjects of bargaining" and thereby committed an unfair labor practice. Defendant argues that the plaintiff's complaint "asked the court to commit an unfair labor practice by changing terms and conditions of employment between the City and its unions." However, defendant fails to cite in its brief any collective bargaining agreement that has been contravened by virtue of the court's ruling.[12] See *Detroit Police Officers Assn, supra* at 349 (a unilateral change in a mandatory subject of collective bargaining constitutes an unfair labor practice). It appears that defendant is relying solely on the "past practices" of the parties to establish its claim of an unfair labor practice. Defendant's argument is therefore merely a rehash of its "past practice" argument as discussed above. As noted, we find no merit to this argument.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette

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[11] In a brief filed in the trial court, defendant argued, "Assuming arguendo that the plaintiff is a party to a collective bargaining agreement with anyone, there is no genuine issue of fact that the controlling past practice establishes the defendant as custodian of the funds . . . ." However, defendant never demonstrated that plaintiff was a party to a collective bargaining agreement and in fact explicitly argued that plaintiff was *not* in fact a party to any such agreements.

[12] Moreover, as discussed *supra*, the court's ruling did not violate the benefit plan charter but instead conformed to the terms of the charter.